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Supreme Court, U.S.
FILED

No. _____ 98 743 OCT 28 1998

IN THE

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1998

WILLIAM LLOYD TURNER, - - - *Petitioner,*

versus

BANK ONE, LEXINGTON, N.A., Et Al., - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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October 28, 1998

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63 pp

QUESTIONS PRESENTED

Did the Respondents fail to comply with the "safe harbor" provisions of Rule 11, F.R.C.P., and, if so, does this fact nullify the award of sanctions against the Petitioner for lack of jurisdiction?

Was the Petitioner's appeal against the Attorney-Defendants time-barred?

IN THE SUPREME COURT OF THE UNITED STATE
October Term 1997
No. _____

William Lloyd Turner, Petitioner
v.
Bank One, Lexington, N.A., et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associat Justices of the Supreme Court of the United States:

William Lloyd Turner, the Petitioner, prays that a Wr of Certiorari issue to review the judgment of the United State Court of Appeals for the Sixth Circuit entered in the above entitled case on July 30, 1998.

OPINION BELOW

The judgment of the United States Court of Appeals fc the Sixth Circuit (Appendix B) was entered on July 30, 1998

JURISDICTION

The jurisdiction of the Supreme Court is invoked unde

28 U.S.C. § 1254.

PARTIES

James Hunt Barker, Plaintiff.

William Lloyd Turner, Attorney/Petitioner.

Bank One, Lexington, N.A., successor to First Security National Bank & Trust Company of Lexington; Bancone Ohio Corporation, an Ohio chartered multi-bank holding company financial management services; Bancone Corporation, an Ohio chartered multi-bank holding company owner of Bankone of Lexington, NA; Kit Stolen, Individually and as president of Bank One of Lexington, NA; William Rouse, Individually and as former president of First Security National Bank & Trust Company of Lexington; Jack Cunningham, Individually; William Hall, Individually and as trust officer of Bank One of Lexington, NA; R.C. Cranfill, Individually and as former trust officer of First Security National Bank and Trust Company of Lexington; Stoll, Keenon & Park; Diane M. Carlton; Charles E. Shivel, Jr.,

sued as Charles Shivel, Esq.; William T. Bishop, III, sued as William Bishop, Esq.; Lisabeth Ann Tully, sued as Elizabeth Ann Tulley, Esq.; Sturgill, Turner & Truitt; Donald Sturgill; Ann Sturgill; Patrick Moloney; Gardner Turner; Deborah Gibby; William Rambicure; Ogden, Newell & Welch; Scott Wendelsdorf; John Ballentine; Julius Rather; Mary Jo Leeds; Walter May; Lawrence Sherman; Mary Jo Martin; Joseph E. Johnson; Miller, Griffin & Marks, P.S.C.; Thomas Miller; Steven Amato; Wyatt, Tarrant & Combs; Edwin Hobson; William McCann; Hopkins Thatcher; Charles M. Tackett; Martin Gebrow, M.D.; Angela Daniel, R.N.; Robert Granacher, M.D.; and Donna Westphal, Defendants.[1]

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[1] All parties to the consolidated appeals decided by United States Court of Appeals for the Sixth Circuit February 11, 1998 Opinion in the combined appeals of 96-5664 and 97-5211 and the subsequent Order of March 16, 1998 denying reconsideration have been named as Respondents herein for the purpose of completeness and opportunity to be heard. However, it appears that the real parties in interest on the limited issues for which this Petition seeks a writ of certiorari (regarding the sanctions which were awarded against Petitioner and from which Petitioner appealed in Appeal No. 97-5211 to the Untied States Sixth Circuit Court of Appeals) are limited to the Petitioner James Hunt Barker and the Respondents Bank One, Lexington N.A., Banc One Ohio Corporation, Banc One Corporation, Kit Stolen, William Rouse, Jack Cunningham, William Hall, R.C. Cranfill, Stoll, Keenon & Park, Diane M. Carlton, Charles E. Shivel, Jr., William T. Bishop, III., Lisabeth Ann Tulley and Angela Daniel (sometimes herein referred to as "the Bank One Defendants"); and the Respondents Sturgill, Turner & Truitt, Donald Sturgill, Ann Sturgill, Patrick Moloney, Gardner Turner, Deborah Gibby, the law firm of Miller, Griffin & Marks, P.S.C., Steve Amato, and Tom Miller (sometimes hereinafter "the Sturgill Defendants").

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STATUTE INVOLVED

Rule 11, F.R.C.P. (Appendix A)

STATEMENT OF THE CASE

This Petition seeks a Writ of Certiorari for this Court to address the interpretation to be given to the 1993 changes to Rule 11 of the Federal Rules of Civil Procedure regarding the substantive and procedural issues relating to the judicial imposition of monetary sanctions in civil litigation.

This Court has not considered such issues since the 1993 revisions to F.R.C.P. Rule 11, and a conflict of jurisprudence has arisen regarding the effect of said 1993 amendments which requires clarification by this Court.

This action arises out of a Complaint filed by James Hunt Barker (hereafter "Barker") on May 25, 1994, in the United States District Court for the Southern District of Florida, against forty-one (41) individual and corporate defendants (hereafter "Respondents") allegedly arising from acts and proceedings denying Petitioner an inheritance which he claimed

to have been due to him. That Complaint alleged that the Respondents had violated the RICO statute, 18 U.S.C. § 1961 *et seq.*, and the Civil Rights statute, 42 U.S.C. § 1983; it also alleged various related state causes of action. The Complaint was signed by Attorneys Louis Wilson Ingram of Washington, D.C. and H. Bryant Sims of Palm Beach, Florida, as counsel of record. It was not signed by the instant Petitioner.

On December 9, 1994, thirteen (13) of the Respondents, in lieu of Answering, filed a Motion to Dismiss the Complaint or, in the alternative, to transfer venue to the United States District Court for the Eastern District of Kentucky. The Florida court granted the Respondents' Motion and transferred venue to Kentucky on November 21, 1994. Thereafter, on March 2, 1995, the Defendants renewed their Motion to Dismiss. Following the change of venue, Attorney William Lloyd Turner (hereafter "Petitioner") appeared as replacement counsel for Barker.

After the parties had briefed the issue, the District Court

granted the Respondents' Motions to Dismiss on September 28, 1995. Because not all of the parties Defendant had joined in the Motions to Dismiss, this did not terminate the action as to them, and the case was not finally dismissed as to all parties until April 11, 1996. Barker then filed a timely Notice of Appeal to the Sixth Circuit on May 13, 1996.

On November 14, 1995, nine (9) of the Defendants (referred to in the trial court's order as "the Sturgill Defendants") moved the Kentucky court to impose sanctions upon Barker and upon his Kentucky counsel, William Lloyd Turner, pursuant to Rule 11, F.R.C.P. Their Motion related solely to allegations made in the initial Complaint and did not refer to any paper which had been filed in the action after Turner entered the case. Nevertheless, the Defendants did not seek to sanction either Ingram or Sims, the attorneys who had signed the Complaint. The court granted this Motion by Order entered April 11, 1996, and directed the Defendants to file an accounting of their fees and expenses incurred in defending the

action.

Thereafter, on May 31, 1996, Defendants Bank One and Stoll, Keenon & Park (referred to by the trial court as "the Bank One Defendants") filed a Motion for Sanctions pursuant to Rule 11, F.R.C.P. The court, by Order dated January 13, 1997, granted the Defendants sanctions against Barker and Turner, jointly, in the amount of $5,083.62. It also granted additional sanctions against Barker alone in the amount of $25,741.01. The court entered an Order awarding sanctions to the Bank One Defendants on April 29, 1997. Barker was ordered to pay sanctions in the amount of $12,914.05. Barker and Turner were jointly ordered to pay further sanctions in the amount of $15,726.75.

Barker filed a "request and Motion for Reconsideration" of this Order, which was treated as a Rule 59 Motion pursuant to *McDowell v. Dynamics Corp. of America*, 931 F.2d 380, 382 (6th Cir. 1991), on May 8, 1997. The court denied that Motion by Order dated May 22, 1997, and Petitioner filed a timely

appeal to the United States Court of Appeals for the Sixth Circuit. That court denied his appeal by Order dated July 30, 1998. This Petition followed.

REASONS FOR GRANTING THE WRIT

I. RULE 11 SANCTIONS SHOULD BE CAUTIOUSLY APPLIED.

The Court should note, first of all, that Rule 11 sanctions should be applied with caution, and only in the clearest of cases. As the Second Circuit has noted, a court imposing Rule 11 sanctions must:

> ...not...stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself. Courts must avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer.

Eastway Construction Corp. v. City of New York, 762 F.2d 245, 254 (2d Cir. 1985).

Accordingly, the Third Circuit has noted that Rule 11

sanctions are appropriate "only if the filing of the complaint constituted abusive litigation or misuse of the court's processes." *CTC Imports and Exports v. Nigerian Petroleum*, 951 F.2d 573, 579 (3d Cir. 1991).

Furthermore, in applying Rule 11, the Court should note that "the mere fact that an action is without merit does not amount to bad faith," requiring the imposition of sanctions. *Miracle Mile Assoc. v. City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980).

In a case which arose on facts closely analogous to those of the case at bar, one federal court noted:

> Sanctions are an extraordinary remedy... Therefore, courts should not grant sanctions on a whim, nor should a party move for sanctions without scrupulously following the procedures for such a request. It is difficult, if not impossible, for a party to move for sanctions without scrupulously following the procedures for such a request.

Brown v. Pierce Mfg. Co., 169 F.R.D. 118, 119 (E.D. Wis. 1996)

As shown below, the Respondents absolutely failed to

comply with the mandates of the "safe harbor" provision, Rule 11(c)(1)(A), F.R.C.P. The court, therefore, should have denied their Motion, and its failure to do so was reversible error.

II. RESPONDENTS DID NOT COMPLY WITH THE "SAFE HARBOR" PROVISIONS OF RULE 11(c)(1)(A), F.R.C.P.

As noted above, the Respondents have failed to comply with the requirements of Rule 11(c)(1)(A), F.R.C.P. That Rule states, in pertinent part:

> A motion for sanctions under this rule...shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion...the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

Compliance with this provision is an absolute prerequisite to filing a Rule 11 motion. As the Sixth Circuit has recently stated:

> Rule 11 cases emerging in the wake of the 1993 amendments have found the "safe harbor" provision to be an absolute requirement. (citing cases) We agree that the rule is unquestionably explicit with respect to this issue. The plain language of Rule 11 specifies that unless a movant has complied with the

> twenty-one day "safe harbor" service, the motion for sanctions "shall not be filed with or presented to the court." (Defendant) did not comply with the "safe harbor" procedural prerequisite; therefore, (its) motion should not have been presented to the court.

Ridder v. City of Springfield, 109 F.3d 288, 296 (6th Cir. 1997).

The treatise Moore's Federal Practice similarly states:

> This "safe-harbor" provision is a mandatory procedural prerequisite. Sanctions imposed without compliance are subject to reversal.

2 J. MOORE, *infra*, § 11.22 [2][b] at n. 7.

To the same effect are the holdings of *Hodges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1323, 1328 (2d Cir. 1995)(Rule 11 "specifically mandates" safe-harbor service); *Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995)("The plain language of the rule indicates that this notice and opportunity prior to filing is mandatory"); *Morganroth & Morganroth v. DeLorean*, 123 F.3d 374, 384 (6th Cir. 1997); *In re VMS Securities Litigation*, 156 F.R.D. 635, 641 (N.D. Ill. 1994); *Thomas v. Treasury Management Ass'n., Inc*, 158 F.R.D. 364

(D. Md. 1994)(compliance with safe-harbor provisions an "absolute prerequisite"); *Omega Sports, Inc. v. Sukyong America, Inc.*, 872 F. Supp. 201, 203 (E.D. Pa. 1995); and *Conn. General Life Ins. Co. v. Thomas*, 910 F. Supp. 297, 304-05 (S.D. Tex. 1995).

The "safe harbor" provision also requires that a movant file his motion promptly upon discovery of the violation, and before the termination of the case. As the Official Commentary to the revised Rule states:

> Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely...Given the "safe harbor" provisions...a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Advisory Committee's Notes to 1993 revision to Rule 11, F.R.C.P., 146 F.R.D. at 590.

Courts, accordingly, have found that if a motion for sanctions is not filed promptly after the discovery of the sanctionable conduct, it is untimely. *Landon v. Hunt*, 938 F.2d

450 (3d Cir. 1991)(six months delay unreasonable); *Sussman Salem, Saxon & Nielsen*, 818 F.Supp. 1510 (M.D. F 1993)(one year delay unreasonable); *Vandeventer v. Wabc Nat. Corp.*, 893 F.Supp. 827 (N.D. Ind. 1995)(five mon delay unreasonable).

Furthermore, a Rule 11 motion absolutely may not filed after the entry of an Order dismissing the case. As treatise Federal Procedure Lawyer's Edition sets out the ru

> A party cannot circumvent the purpose of the safe harbor provision by waiting until after the case is settled or the claims dismissed to move for sanctions, since there is then nothing for the offending party to amend or correct.

27A FED. PROC. L.ED. §62:861 at n. 22 (1996), *citing, Prog Federal Savings Bank v. Lenders Ass'n, Inc.*, 1996 WL 57 (E.D. Pa. 1996); Comment, *A Practitioner's Guide to the A Amendment to Federal Rule of Civil Procedure 11*, 67 TEM L. REV. 265, 285 n. 136 (1994)("the safe harbor pe precludes a party from deferring service on a Rule 11 m until the conclusion of the case"), *citing Mary Ann Pens*

Inc. v. Lingle, 847 F.2d 90, 100 (3d Cir. 1988).

The Sixth Circuit has specifically adopted the foregoing rule. In *Ridder*, it stated unequivocally:

> By virtue of its nature, the "safe harbor" provision cannot have any effect if the court has already entered judgment in the case; it is too late for the offending party to withdraw the challenged claim...[Defendant] has given up the opportunity to receive an award of Rule 11 sanctions in this case by waiting to file the motion until after the entry of summary judgment...a motion for sanctions under Rule 11 must be served on the offending party for a period of "safe harbor" at least twenty-one days prior to the entry of final judgment or judicial rejection of the offending contention. A party seeking sanctions must leave sufficient opportunity for the opposing party to choose whether to withdraw or cure the offense voluntarily before the court disposes of the challenged contention.
>
> Pragmatic realities require such strict adherence to the rule's outlined procedure. By delaying the motion until after summary judgment was granted, [defendant] deprived Ridder's counsel of the "safe harbor" to which the rule says he is entitled. Had [plaintiff's] counsel been allotted his "safe harbor" service, he could have avoided sanction by withdrawing the claims against [defendant]. That is the very essence of a "safe harbor." Instead, [plaintiff's] counsel was unable to choose for himself whether to continue asserting claims against the [defendant] when faced with a potential payout from his own pocket...

> In sum, adhering to the rule's explicit language and overall structure, we hold that sanctions under Rule 11 are unavailable unless the motion for sanctions is served on the opposing party for the full twenty-one day "safe harbor" period before it is filed with or presented to the court; this service and filing must occur prior to final judgment or judicial rejection of the offending contention. Quite clearly, then, a party cannot wait until after summary judgment to move for sanctions under Rule 11.

Ridder v. City of Springfield, 109 F.3d at 296-97

Applying this rule to the facts of the case at bar, it is clear that the Respondents' Motions for sanctions should not have been filed with or presented to the court, and that the trial court accordingly lacked jurisdiction to consider them. As noted above, there were two groups of defendants who filed separate Motions for Sanctions. The "Sturgill Defendants" filed their Motion for Sanctions on November 14, 1995, nearly seven weeks after the court had dismissed the action as to them. The "Bank One Defendants" filed their Motion to Dismiss on May 31, 1996, more than eight months after the court had dismissed the action as to them.

It is obvious, therefore, from the face of the Record, that neither group of defendants complied with the "safe harbor" provisions of Rule 11. Under the foregoing rule, this fact constituted an absolute bar to the filing of that motion, or its consideration by the trial court. Accordingly, the court should not have granted the Defendants' motions; and the Sixth Circuit should have granted Petitioner's appeal.

III. A LETTER IS NOT A "MOTION."

It is true, of course, that prior to dismissal, each group of Defendants sent a letter to Petitioner advising him that they considered his conduct sanctionable. The Sixth Circuit held that having done this, Respondents were not required to serve the Petitioner with a copy of the Motion itself, or to have filed the Motion, prior to dismissal. (Opin. at 4-5)("We conclude that the purpose of the safe harbor provision was complied with in this case by the warning letters Turner received"). Respectfully, Petitioner insists that the Sixth Circuit is mistaken, for a number of reasons:

(1) Since the 1993 revision, "a Rule 11 motion cannot be made unless there is some paper, claim, or contention that can be withdrawn." *Ridder*, 109 F.3d at 295, *citing*, Varro, *infra*, at 65.

Therefore, as the Sixth Circuit has stated:

> ...it follows that a party cannot wait to seek sanctions until after the contention has been judicially disposed of.

Ridder, 109 F.3d at 295.

The operation of this rule does not depend upon whether the party to be sanctioned has been properly served with notice. The *Ridder* court specifically noted that even when the opponent has received proper notice:

> If the court disposes of the offending contention before the twenty-one day "safe harbor" period expires, a motion for sanctions cannot be filed with or presented to the court.

Ridder, 109 F.3d at 295.

Consequently, as Dean Varro observed:

> ...a party need not have to worry about post-dismissal sanctions from either the

adversary or the court.

Varro, *infra*, at 65.

Petitioner reiterates, if a claim is dismissed without a sanctions motion having been filed, counsel's Rule 11 liability is at an end. Therefore, even if the Respondents' letters had afforded the Petitioner adequate notice (and they did not), Respondents nevertheless waived their right to move for sanctions by waiting until after the case had been dismissed to file their Motions.

(2) The "safe harbor" provision contemplates two different kinds of notice: "informal notice", i.e., a letter, personal contact, or telephone call; and "formal notice", i.e., service of a Motion. WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: Civil 2d § 1337 at n. 3 (1996 Supp.).

The Official Commentary states:

> ...the "safe harbor" period begins to run upon service of the motion.
>
> In most cases, however, counsel should be expected to give informal notice to the other party,

> whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

Advisory Committee Notes on 1993 Amendments.

It is clear, therefore, that the Rule contemplates two separate kinds of notice, "formal" and "informal." Moreover, while "informal" notice is optional, "formal" notice is mandatory.

(3) "Informal" notice does not satisfy the requirements of Rule 11(c)(1)(A), nor does it obviate the necessity for "formal" notice. Indeed, the reported cases which have considered this question have reached the opposite conclusion.

(a) *Sears, Roebuck & Co. v. Sears Realty Co., Inc.*, 932 F.Supp. 392 (N.D.N.Y. 1996), holds that a letter to opposing counsel does not satisfy the requirements of Rule 11(c)(1)(A) *Sears, Roebuck & Co.*, 932 F. Supp. at 408 ("Neither the letter nor the oral request to withdraw the motion constitute sufficient notice to defendants within the meaning of the 'safe harbor provisions of Rule 11").

(b) A year earlier, the same court pointedly stated that the requirements of Rule 11 are not met where a party "has simply threatened to seek Rule 11 sanctions." *Spencer v. Cohen,* 886 F.Supp. 235, 236 (N.D.N.Y.1995).

(c) In *Bowler v. U.S. I.N.S.*, 901 F.Supp. 597 (S.D.N.Y. 1995), the court specifically refused to impose sanctions because it did not believe that a letter satisfied the requirements of Rule 11(c)(1)(A). *Bowler v. U.S. I.N.S.*, 901 F. Supp. at 604.

(d) In *Thomas v. Treasury Management Association, Inc.*, 158 F.R.D. 364 (D.Md. 1994), the court stated that in addition to "a simple phone call or letter," a party seeking Rule 11 sanctions must also give the party sought to be sanctioned "formal notice of intent to file a motion for sanctions." *Thomas,* 158 F.R.D. at 369.

(e) In *Lancaster v. Zufle,* 170 F.R.D. 7 (S.D.N.Y. 1996), the defendant conceded that she had failed to formally comply with the "safe harbor" provisions of Rule 11. She nevertheless "ask[ed] the court to deem as the equivalent of

compliance a letter sent by defendant's counsel" warning him to withdraw the suit.

The court "declin[ed] to accept this as meeting the requirements of Rule 11(c)(1)(A)" because:

> ...the plain language of the Rule expressly requires the serving of a formal motion, and with good reason, for by serving such a motion a movant itself certifies its own compliance with Rule 11 in bringing such a motion and thus places its adversary on notice that the matter may not be viewed as simply part of the paper skirmishing among adversaries that too often characterizes litigation in this uncivil age.

Lancaster, 170 F.R.D. at 7.

In a footnote, the court added:

> *A fortiori*, defendant's postjudgment letters to plaintiff...can likewise in no way be deemed the equivalent of compliance with the "safe harbor."

Lancaster, 170 F.R.D. at 7 n. 1.

A similar rule must govern the case at bar. "Writing a

letter" is not the same as "serving a motion."[2] This Court should require "strict adherence to the rule's outlined procedures." *Ridder*, 109 F.3d at 297.

> ...sanctions under Rule 11 are unavailable unless the motion for sanctions is served on the opposing party...prior to final judgment or the rejection of the offending contention.

Ridder, 109 F.3d at 297.

Therefore, Respondents' letters did not afford Petitioner the "specific written notice" required by Rule 11.

(4) As noted above, Rule 11 is an extremely harsh remedy which should be applied with caution, and only in the clearest of cases. *In re Kouterick*, 167 B.R. 353, 362 (Bkrtcy. D.N.J. 1994).

(5) Furthermore, all doubts are resolved in favor of the attorney or party sought to be sanctioned. *Tripe v. Skinner*, 19

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[2] Indeed, Dean Varro has stated that the very purpose of the revision was to prevent counsel from threatening Rule 11 sanctions in a letter, without serving a formal motion. G. Varro, *The New Rule 11: Past as Prologue?*, 28 LOY. L.A.L.R. 39, 63 (1994)

F.3d 72, 78 (2d Cir. 1994); *Roderick v. City of Schnectedy*, 2
F.3d 1341 (2d Cir. 1993).

A contrary interpretation would require the Court tc substitute the word "letter" in place of the word "motion." Such a "substantial compliance" argument is dubious, at best. As the foregoing cases demonstrate, any doubt must be resolvec against the imposition of sanctions. Therefore, if it is ever doubtful that a letter satisfies the requirements of Rule 11, tha doubt must be resolved in the Petitioner's favor.

(6) At least in the case of the Bank One Defendants, i is not at all clear that their letter provided Turner with "specific written notice" that they intended to sanction him. As Defendants themselves concede, what they sent to Petitioner or June 13, 1995, was merely a copy of a letter which they hac earlier written to attorneys H. Bryant Sims and Louis Wilsor Ingram on January 23, 1995. That letter warned Sims anc Ingram that Defendants intended to sanction them for supposec defects in their Complaint.

Petitioner did not sign the Complaint. There was nothing in Defendants' letter that even suggested they intended to sanction Petitioner for that Complaint, under the "later advocating" language of revised Rule 11. Therefore, contrary to the holding of the Sixth Circuit, Defendants' letter of June 13, 1995 did not afford Petitioner the "specific written notice" required by Rule 11.

(7) Although Petitioner did not actually sign the Complaint, the Sixth Circuit held that he was liable nonetheless, based on the "later advocating" language of Rule 11. (Opin. at 4).

At the time Defendants threatened Petitioner with sanctions, case law held uniformly that an attorney could only be sanctioned for papers which he had actually signed. *Pavelic & LeFlore v. Marvel Group*, 493 U.S. 120 (1989). No reported opinion had yet extended the rule to include "later advocating" a document which the attorney himself had not personally

signed.[3]

IV. THE COURT'S INHERENT POWERS DID NOT PERMIT THE AWARD OF SANCTIONS.

The Sixth Circuit also held, in the alternative, "that the award of sanctions would also have been proper pursuant to the District Court's inherent powers, especially if Rule 11 was inadequate to address the situation." (Order at 5).

Again, the court is simply mistaken. Although this remedy does not require "safe harbor" service, it obviously is subject to the Due Process clause and to its notice requirements. The Sixth Circuit could not have relied on its inherent powers to sanction the Petitioner for two reasons:

First, a court may rely on its inherent powers only when Rule 11 is inadequate to support sanctions. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 33 (1991). Defendants did not

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[3] Two circuits have subesquently declined to do so. *O'Ferral v. Trebol Motors Corp.*, 45 F.3d 561 (1st Cir. 1995); *O'Brien v. Alexander*, 101 F.3d 1479 (2d Cir. 1996). The only reported case holding the contrary is *Turner v. Sunguard Business Systems, Inc.*, 91 F.3d 1418 (11th Cir. 1996). The need to resolve this split among the circuits affords yet another reason why this Court should accept certiorari.

show that Rule 11 is inadequate to afford them relief. Indeed, that Rule is fully adequate, had its provisions been followed.

Second, the *sua sponte* imposition of sanctions by a court under the inherent powers doctrine always requires that the party to be sanctioned is afforded notice and an opportunity to respond. *Chambers v. NASCO, Inc.*, 115 L.Ed.2d at 53; *In re Mroz.* 65 F.3d 1567 (1st Cir. 1995); *Resolution Trust Corp. v. Dabney,* 73 F.3d 262 (10th Cir. 1995).

Petitioner was not on notice that the trial court was considering the *sua sponte* imposition of sanctions, nor was he given any opportunity to respond thereto. Indeed, it is obvious that the trial court did not even consider this basis for imposing sanctions. The *post hoc* rationalization indulged by the Sixth Circuit clearly offends Due Process. *Boddie v. Connecticutt,* 401 U.S. 371, 379 (1971)(Due Process requires notice and the opportunity to be heard before any governmental deprivation of a property interest); *Lerch v. Boyer,* 929 F.Supp. 319, 325 (N.D. Ind. 1996)(court must issue show cause order before

imposing sanctions *sua sponte*).

Therefore, the "inherent powers" doctrine does not provide an alternative basis for the imposition of sanctions.

V. THE APPEAL IS NOT UNTIMELY AS TO THE STURGILL DEFENDANTS.

As noted above, the Sturgill Defendants were awarded sanctions by Order dated January 13, 1997. By a subsequent Order dated January 29, 1997, the court certified this Order as final and appealable pursuant to Rule 54(b), F.R.C.P. The Sixth Circuit held that although the appeal was timely as to the the Bank One Defendants, it was untimely as to the Sturgill Defendants.

Respectfully, Petitioner insists that the Sixth Circuit is mistaken and that his appeal from the Order granting sanctions to the Sturgill Defendants was timely filed, for three reasons:

(1) If the court later re-files the Rule 54(b) judgment, the time to appeal runs from entry of the second judgment, not the original judgment. *Taylor v. Continental Group Change in*

Control Severence Pay Plan, 933 F.2d 1227, 1231 (3d Cir. 1991). As the record reflects, Judge Forester entered a second Order on April 29, 1997, certifying that all previously entered orders were final and appealable. That Order incorporated by reference the court's prior orders awarding sanctions. This Judgment of finality superseded the earlier Rule 54(b) certification. *In re Austin*, 26 B.R. 751, 752 (Bkrcty. S.D. Fla. 1952).

As noted above, Barker timely moved to alter or amend this Judgment, thus tolling the appeal time. When Barker's motion was denied, Petitioner timely filed his appeal. That appeal, therefore, was not time-barred.

(2) If a Rule 54(b) judgment is outside the power of the district court to enter, the parties need not take an immediate appeal and may challenge the partial adjudication on appeal from the final judgment. 10 J. MOORE, MOORE'S FED. PRAC. & PROC. § 54.26[2] at n. 4 (3d ed. 1997).

As shown above, the partial adjudication certified as final

and appealable was beyond the power of the district court to render, because Defendants' motion was not timely filed. Therefore, Petitioner was not required to file an immediate appeal, but was entitled to wait until the entry of a final judgment in the case before filing his appeal.

(3) Pursuant to Rule 12(h)(3), F.R.C.P., a void judgment may be set aside at any time by any court before which it comes for consideration. It is well settled that a void judgment may be collaterally attacked for the first time on appeal. *U.S. v. Bustillos*, 31 F.3d 931 (10th Cir. 1994).

The Order imposing sanctions was and is void *ab initio* because the Defendants' Rule 11 motion was not filed prior to dismissal. This jurisdictional defect could have been properly considered by the Sixth Circuit as a basis for setting aside the judgment.

VI. THE CIRCUITS ARE SPLIT ON THIS QUESTION.

The Court should grant certiorari in order to resolve a split which has arisen among the circuits on this question. While

the language of the revised Rule 11 seems clear, at least two circuits appear to be following a disparate rule.

In *Smith v. CB Commercial Real Estate Group, Inc.*, 947 F. Supp. 1282 (S.D. Ind. 1996), the court stated that under the Seventh Circuit's interpretation of Rule 11;

> ...the latest a party may timely move for Rule 11 sanctions...is 30 days after entry of final judgment.

Smith, 947 F. Supp. at 1284, *citing Burda v. Ecker, Co.*, 2 F.3d 769, 774 (7th Cir. 1992).

The Complaint in *Smith* had been filed on January 6, 1995; therefore, the action was clearly subject to the provisions of the revised Rule 11. Moore's Federal Practice cites *Smith* as setting out the correct rule for the Seventh Circuit. 2 J. MOORE, *supra*, § 11.22[1][c] at n. 15, *citing Smith* and *Kaplan v. Zenner*, 956 F.2d 149, 151-52 (7th Cir. 1992).

Moore further states that in the Fourth Circuit, a Rule 11 Motion may be filed until twenty days after the entry of judgment. 2 J. MOORE, *supra*, § 11.22[1][c] at n. 15, *citing*

Ortega v. Geelhaar, 914 F.2d 495, 497-98 (4th Cir. 1990).

On the other hand, as shown above, both the Third Circuit and the Sixth Circuit, as well as the unequivocal language of the Rule itself and the Official Commentary thereto, state that a Rule 11 Motion cannot be filed after the case has been dismissed.

There is also a split among Federal District Courts concerning whether a letter satisfies the notice requirement. As noted above, the Northern District of New York, the Southern District of New York, and the District of Maryland have all held that it does not. However, another division of the Southern District of New York, in an unreported case, has reached the opposite conclusion. *Little v. Twentieth Century-Fox Film Corp.*, No. 819CIV.8526, 1996 WL 376971 (S.D.N.Y. 1996).

There is also a split among circuits concerning the reach of the "later advocating" language in Rule 11, F.R.C.P. *See,* page 22, *supra.*

This Court should grant certiorari in order to resolve

these important questions.

CONCLUSION

In *Connecticut General Life Insurance Company v. Thomas*, 910 F. Supp. 297 (S.D. Tex. 1995), the court faced a situation closely analogous to that presented by the case at bar. One of the parties defendant had moved for Rule 11 sanctions without giving the plaintiff the "safe harbor" notice required by the revised Rule. In denying the motion, the court observed:

> The Court finds even more astonishing the fact that [movant's counsel] quite obviously failed to make a reasonable inquiry into the law governing motions for sanctions before she filed a motion accusing another attorney of failing to make a reasonable inquiry into the law.

Conn. General Life Ins. Co., 910 F. Supp. at 304.

The instant Respondents seek to sanction Petitioner for making frivolous legal arguments. At the same time, Respondents' counsel, all of whom are experienced attorneys,

have absolutely failed to comply with the requirements of the "safe harbor" provision of Rule 11.

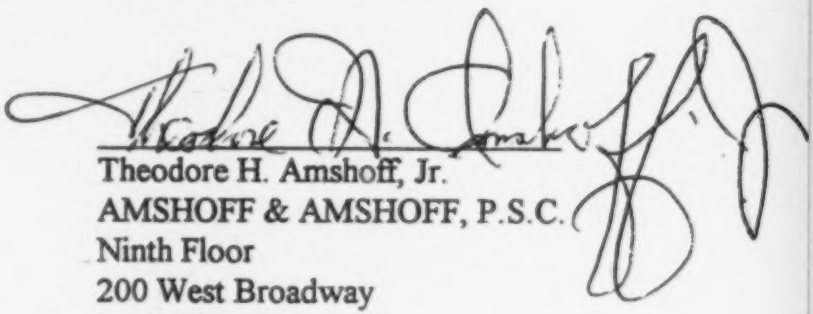
The issues involved in this Petition have an importance and relevance throughout the nation to litigants and counsel in civil proceedings in the courts of the United States. These issues relating to the substantive and procedural requirements for the imposition of monetary sanctions upon parties and their attorneys under the 1993 revisions to Rule 11 have not been otherwise addressed by this Court in any detail.

Lower courts throughout the United States have struggled to differing approaches and standards in the application of the 1993 revisions to Rule 11. For the sake of the parties to this action, as well as to all civil litigants and their counsel, there is a grave, compelling, national need for the guidance of this Court in establishing a uniform jurisprudence on the substantive and procedural issues of Rule 11 sanctions.

For this reason, and for all of the reasons hereinabove set out, the Court should grant the Petition and review the

Judgment of the United States Court of Appeals for the Sixth Circuit in the above-captioned case. Petitioner prays for an Order of the Court so holding.

Respectfully submitted,



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APPENDIX

APPENDIX A

RULE 11 F.R.C.P.

RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or the later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an

inquiry reasonable under the circumstances,-

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the

attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How initiated.*

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law

firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

APPENDIX B

No. 97-5787

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES HUNT BARKER, Plaintiff

WILLIAM LLOYD TURNER, Appellant-Attorney

v.

BANK ONE, LEXINGTON N.A., successor to First Security National Bank & Trust Company of Lexington; BANCONE OHIO CORPORATION, an Ohio chartered multi-bank holding company financial management services; BANCONE CORPORATION, an Ohio chartered multi-bank holding company owner of Bankone of Lexington, NA.; KIT STOLEN, Individually and as president of Bank One of Lexington, NA; WILLIAM ROUSE, Individually and as former president of First Security National Bank & Trust Company of Lexington; JACK CUNNINGHAM, Individually and as state head of Bank One of Lexington, NA; WILLIAM HALL,

ORDER

Individually and as trust officer of Bank One of Lexington, NA; R.C. CRANFILL, Individually and as former trust officer of First Security National Bank and Trust Company of Lexington; STOLL, KEENON & PARK; DIANE M. CARLTON; CHARLES E. SHIVEL, JR., sued as Charles Shivel, Esq.; WILLIAM T. BISHOP, III, sued as William Bishop, Esq.; LISABETH ANN TULLY, sued as Elizabeth Ann Tulley, Esq.; STURGILL, TURNER & TRUITT; DONALD STURGILL; ANN STURGILL; PATRICK MOLONEY; GARDNER TURNER; DEBORAH GIBBY; WILLIAM RAMBICURE; OGDEN, NEWELL & WELCH; SCOTT WENDLESDORF; JOHN BALLENTINE; JULIUS RATHER; MARY JO LEEDS; WALTER MAY; LAWRENCE SHERMAN; MARY JO MARTIN; JOSEPH E. JOHNSON; MILLER, GRIFFIN & MARKS, PSC; THOMAS MILLER; STEVEN AMATO; WYATT, TARRANT & COMBS; EDWIN HOBSON;

WILLIAM MCCANN;)
HOPKINS THATCHER;)
CHARLES M. TACKETT;)
MARTIN GEBROW, M.D.;)
ANGELA DANIEL, R.N.;)
ROBERT GRANACHER,)
M.D.; DONNA WESTPHAL,)
Defendants-Appellees)

Before: SUHRHEINRICH and DAUGHERTY, Circuit Judges; MCKEAGUE, District Judge. *

William Lloyd Turner appeals pro se an order assessing sanctions against him pursuant to Fed. R. Civ. P. 11 as counsel for the plaintiff in an action alleging RICO and civil rights violations as well as state tort claims. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

The plaintiff in the underlying action, James Hunt Barker, filed a complaint through counsel in federal court in Florida against over forty defendants, whom he alleged had

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* The honoraable David W. McKeague, United States District Judge for the Western District of Michigan, sitting by designation.

conspired to deprive him of his rightful inheritance in a will contest action in Kentucky state courts. The action was transferred to the Eastern District of Kentucky, where Turner entered his appearance as substitute counsel. Defense attorneys for several of the defendants wrote to Turner in April and June, 1995, warning him that the action was frivolous and that they would seek sanctions. Turner did not respond. The complaint was dismissed as to these defendants on September 28, 1995, and final judgment was entered on April 11, 1996. Attorneys representing a group of defendants consisting of banks and bank employees served Turner with a motion for Rule 11 sanctions on May 9, 1996, and filed the motion on May 31, 1996. The district court entered an interim order granting the motion and directing the filing of a statement of fees. Turner moved for reconsideration of this order, which was denied. On April 29, 1997, the court awarded sanctions against Barker and Turner jointly in the amount of $15,726.75 and against Barker alone in the amount of $12,914.05. Reconsideration of that order was also denied, and this appeal by Turner followed. Another group

of defendants, consisting of several law firms and lawyers, had also been awarded sanctions in an earlier order, reconsideration of which was denied on January 28, 1997. Barker filed notices of appeal from the final judgment and the earlier award of sanctions, which this court affirmed. *Barker v. Bank One of Lexington, N.A.*, No. 96-5664/97-5211 (6th Cir. Feb. 11, 1998)(unpublished).

On appeal, Turner urges that sanctions were improvidently assessed against him, particularly because he did not sign the original complaint filed in the case. He also argues that the defendants did not comply with the "safe harbor" provision of Fed. R. Civ. P. 11(c)(1)(A). He purports to be appealing from both awards of sanctions. Defendants counter these argaumetns, and allege that Turner is estopped from challenging the award of sanctions because he admitted that the pleadings he filed in the underlying action were frivolous in proceedings before the Kentucky Supreme Court which resulted in a one-year suspension of his license to practice law. Defendants also argue that sanctions could properly have been

assessed against Turner under 28 U.S.C. § 1927 and the district court's inherent power. Finally, counsel for the bank defendants has filed a motion for damages and double costs, pursuant to Fed. R. App. P. 38, and Turner has responded to that motion.

Initially, we conclude that, though Turner addresses both orders assessing sanctions against him, we lack jurisdiction over the earlier order awarding fees to the law firm defendants because Turner did not file a notice of appeal from that order, which was final on January 29, 1997. The earlier order was immediately appealable as a post-judgment order, *see United States v. One 1985 Chevrolet Corvette*, 914 F.2d 804, 807 (6th Cir. 1990), and Turner's failure to file a timely notice of appeal from that order deprives the court of jurisdiction. *See Jerningham v. Humphreys*, 868 F.2d 846, 847 (6th Cir. 1989). The plaintiff, Barker, filed a pro se notice of appeal from that order, which was addressed in this court's earlier decision. The notice of appeal filed by Turner on June 23, 1997, was timely only as to the award of sanctions to the bank defendants.

Turner's argument that Rule 11 sanctions were not

warranted in this case lacks merit. This court reviews an award of sanctions by the district court for an abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Sanctions were properly assessed for abuse of the judicial system. *Id.* at 397. As this court concluded in its earlier review of the final judgment, this action was precluded by the final decisoin of the state courts in the will contest action. Barker had been informed of this defect in a previous federal action nearly identical to this one. When defendants moved to dismiss on this basis, Turner signed and filed pleadings in opposition, raising the frivolous arguments that the state courts lacked subject matter jurisdiction over the probate action and that the state court decisions were not res judicata with respect to these claims, among other arguments. Based on these actions, Turner was properly assessed sanctions. The fact that he did not sign the original complaint does not insulate him from responsibility, where he signed other pleadings advocating the same frivolous positions. *See O'Ferral v. Trebol Motors Corp.*, 45 F.3d 561, 563 (1st Cir. 1995)(per curiam).

The parties have briefed at length the issue of whether Turner's admission during state bar disciplinary proceedings that the pleadings in the underlying action were frivolous estops him from arguing that sanctions were not warranted. We do not reach this issue because sanctions were clearly warranted in any event.

The only arguable issue raised on appeal is whether the defendants properly complied with the safe harbor provision of amended Rule 11, which requires a motion for sanctions to be served on counsel 21 days before it is filed with the court. As this court has found, the purpose of this provision is to allow a party or counsel to avoid sanctions by withdrawing the challenged claims or his representation. *Ridder v. City of Springfield,* 109 F.3d 288, 294 (6th Cir. 1997), *cert. denied,* 118 S.Ct. 687 (1998). The court also held that service must occur at least 21 days before final judgment, otherwise the opportunity to invoke the safe harbor is lost. *Id.* at 295. In *Ridder*, defendants did not serve the plaintiff with the motion for sanctions prior to filing, which took place after the entry of

summary judgment. The court therefore reversed the award under Rule 11, because no safe harbor was afforded. This case is distinguishable. Counsel for the defendants wrote to Turner in April and June, 1995, shortly after he entered his appearance for the plaintiff, warning him in no uncertain terms that they would be seeking sanctions due to the obvous frivolity of this case. Turner had more than sufficient time to attempt to convince his client that voluntary dismissal was required, or to withdraw from representation. The motions to dismiss were not granted until September 28, 1995. Thereafter, defendants also served Turner with their motion for sanctions 21 days before filing it with the court. We conclude that the purpose of the safe harbor provision was complied with in this case by the warning letters Turner received. He elected not to avail himself of the safe harbor. The district court reached this same conclusion in denying the motion for reconsideration.

Moreover, we conclude that the award of sanctions would also have been proper pursuant to the district court's inherent powers, especially if Rule 11 was inadequate to address

the situation. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991); *Runfola & Assocs., Inc. v. Spectrum Reporting II, Inc.*, 88 F.3d 368, 375 (6th Cir. 1996)(per curiam).

Finally, we turn to the motion for damages and double costs under Fed. R. App. P. 38. Defendants argue that damages are proper under this rule because Turner was estopped from filing this appeal by his admissions that his underlying conduct was frivolous in state bar disciplinary proceedings, and because this appeal was twice dismissed for failure to adhere to the briefing schedule, and subsequetnly reinstated. However, we find that Turner raised one issue on appeal regarding the safe harbor provisions of Rule 11 that was not decided in the state disciplinary proceedings, and therefore the entire appeal cannot be found to be frivolous. Furthermore, the clerk has already granted Turner's motions to reinstate the appeal, and that fact does not provide a basis for awarding damages.

For all of the above reasons, the motion for damages and double costs is denied and the district court's order of April 29, 1997, assessing sanctions against Turner and Barker in favor of

the bank defendants is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Leonard Green /s/
Clerk